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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 69

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

v.

BARBARA JAMES, individually and on behalf of her minor child, Maurice James, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLEES

JONATHAN WEISS
DAVID GILMAN

MFY Legal Services
759 Tenth Avenue
New York, New York

CHRISTOPHER H. CLANCY

Columbia Center on
Social Welfare Policy
and Law
401 West 117th Street
New York, New York

Attorneys for Appellees

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ARGUMENT

I

The reply brief for appellant Wyman suggests new factual issues in order to make three elementary claims: 1) that a visit to a recipient's home is among the best methods for

collecting information, 2) that home visits are an aid in neglect proceedings; 3) that requiring warrants is inappropriate in a welfare setting. These three claims do not bear up under critical analysis.

The appellant admits, as it must, that there are numerous methods available, other than mandatory home visits, for the welfare department to ascertain information necessary for the administration of their welfare program. Yet, the appellants claim that

> "a reasonable procedure is not made unreasonable because alternative methods of achieving the same end exist." (Reply Brief, p. 2)

Reasonableness is not the issue in this case. *Berger v. N.Y.* 388 U.S. 41 (1967); *Katz v. U.S.* 389 U.S. 347 (1967); *Byars v. U.S.* 273 U.S. 528 (1927). The appellant may debate, outside the Constitutional context, as to whether home visits are indeed useful. (See Union's *amicus.*) But, whether they serve any purpose at all is not determinative of the Constitutional question. The intrusion into the home is an act forbidden by the Constitution. Even if it were the sole method available of establishing facts, it would be Constitutionally suspect. The existence of "alternative methods of achieving the same end" necessitates a finding of Unconstitutionality, since whenever alternate methods of achieving the same end exist, the method least destructive of Constitutional rights must be employed. *Shelton v. Tucker,* 364 U.S. 479 (1960).

The appellants' reply brief relates a story of child abuse. Without a complete transcript of the judicial determination and findings of fact, it is impossible to tell, whether a home visit could have prevented or mitigated the abuse. It should be noted however, that neglect petitions can be issued on rather slender factual allegations. For example, the appellant (Reply Brief, p. 10) states that if a recipient should refuse a home visit, not only will the welfare payments be terminated, but the welfare department may consider "steps . . . to protect the child," i.e., the institution of neglect proceedings.

Appellant suggests that the right to a prior hearing means that a recipient can refuse a home visit without fear of loss of benefits as a "direct consequence" (Reply Brief pp. 10) of her refusal to allow a home visit. Mrs. James had such a prior hearing and was told her benefits would be cut off. The hearing officers (who are not attorneys), of course, only apply the regulations and, not trained in law, do not consider Constitutional questions. Therefore a prior hearing is but an internal review by the welfare agency where the recipient can choose between allowing the caseworker into her home or face termination of aid.

It may be true that by allowing government officials to place television cameras in every home, coupled with the power to force entry at any time, detection and prevention of crimes such as murder of a child or adult, or prevention and detection of health hazards or child abuse, would be greatly increased. True or not, these are devices which the Constitution forbids in order to preserve other Constitutional rights, such as the right of privacy and the sanctity of family life. Appellant does not assert that welfare clients are unique among the poor or, for that matter, among all the parents in neglecting or abusing children to a greater extent, nor could they, as there appears to be no such evidence in that regard. (Of course, the vast majority of neglect petitions do not speak to physical abuse but emotional climate and moral leadership.) To single out welfare clients as people who must submit to the intrusion of a home visit predicated upon fears of potential neglect violates equal protection. *Yick Wo vs. Hopkins*, 118 U.S. 356 (1886); *Harper vs. Board of Elections*, 383 U.S. 663 (1966). Moreover, there is no statutory or regulatory authority that the home visit is designed or could be designed as a child abuse protection procedure; rather this is a purpose now adduced by the State to justify unconstitutional intrusions. And in this justification, the State suggests the extent of arbitrary and humiliating demands that may be imposed upon a welfare family.

> "The worker can arrange to see [the child] in the home." (Page 4 of Appellants' brief)

The worker can also demand anything else that he or she feels necessary for judgment about "the welfare of the child" and ask in that home, in front of child and parents, questions that may be embarrasing and humiliating for both. "The welfare of the child" should not mean unlimited discretion by caseworkers to give orders and interrogate parents and children in their private homes. Appellees do not seek a broad decision as to the extent of the right of privacy of welfare clients that are so clearly threatened by the arbitrary powers of the caseworker. All they seek in this case is the one clear Constitutional protection they have—freedom from unwanted and unwarranted home visits.

Appellees do not admit that warrants would justify home visits. What they assert is that if home visits ever were to be allowed, the one minimum requirement would be warrants. The appellants attempt to distinguish between home visits and other searches made by warrants. Clearly, if a warrant procedure were established for welfare home visits, it would be a warrant procedure differing from other searches conducted by warrants by other agencies. As in *Camara v. San Francisco,* 387 U.S. 523 (1967), entry, of course, could not be made by force and, as in any procedure for warrants, the warrant must be based upon standards of what the appropriate objects of searches are and what external evidence leads to necessity for search. Cf. *Grau v. U.S.*, 287 U.S. 124 (1932); *Spinelli v. U.S.*, 393 U.S. 411 (1969); 19 ALR_3 727. The English system of civil warrants provides other examples. Food Drug ct., 1955 4 & 5, Eliz. 2c. H Sect $100_{(2)}$; Water Act 1948 11 & 12 6 c. 42 Section 48 (3) Clean Air Act, 1956, 4 & 5 Eliz. 2, c. 52 Section 31 and 32. In any event, the question of what type of warrants and procedures ought to be employed in conducting a welfare search is not before this Court. What is before this Court is the question of whether 1) home visits can ever be permitted when not desired by welfare clients; 2) if ever permitted, can they be allowed in the ab-

sence of a warrant. It is up to the welfare department, not this Court or appellants, to try to establish a warrant system if home visits are ever to be permitted with a warrant.

CONCLUSION

The decision below should be affirmed.

JONATHAN WEISS
DAVID GILMAN
CHRISTOPHER H. CLANCY
Attorneys for Appellees